Office-Supreme Court, U.S.
FILED
AUG 8 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1980
No. 80-2012

TREVA ANN BOWLING,

Petitioner,

VS.

WILLIAM LEE BOWLING,

Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BILL McCOY
308 North Jackson
Odessa, Texas 79761
(915) 332-1471
ATTORNEY FOR
RESPONDENT

OF COUNSEL:

JOHN W. CLIFF, JR.
307 North Grant
Odessa, Texas 79761
(915) 332-1393

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Statutes and Constitutional Provisions Involved	2
Statement of the Case	2
Argument	5
Jurisdiction	6
Due Process	11
Equal Protection	14
Equal Rights	15
Freedom of Religion	16
Right of Privacy	18
Conclusion	20
Certificate of Service	21
Statutes and Rules:	
28 U.S.C. §1257(3)	1,2 5,6
Supreme Court Rule 12	7
Supreme Court Rule 23 (1) (F)	20
Supreme Court Rule 23 (4)	20
Supreme Court Rule 40 (3)	2

TABLE OF AUTHORITIES

Cases:	Page
Edwards v. Strong, 147 Tex. 155, 213 S.W. 2d 979 (1948)	10
Frantzen v. Frantzen, 349 S.W.2d 765 (Tex. Civ. App. — San Antonio 1961)	17,18
Jarrett v. Jarrett, _____U.S._____ ..	13
Jarrett v. Jarrett, 400 N.E.2d 421 (Ill. 1980)	13
Lynch v. New York ex rel Pierson, 293 U.S. 52 (1934)	6,7,8
Noyes v. Jack, 443 S.W.2d 89 (Tex. Civ. App. — Beaumont 1969)	17
Salvaggio v. Barnett, 248 S.W.2d 244 (Tex. Civ. App. — Galveston 1952)	18
Stanley v. Illinois, 405 U.S. 645 (1972)	13
Street v. New York, 394 U.S. 576 (1969)	9
Texas State Highway Department v. Fillmon, 150 Tex. 460, 242 S.W.2d 172 (1951)	10
Watson v. Glenn Falls Insurance Company, 505 S.W.2d 793 (Tex. Sup. 1974)...	10
Watts v. Watts, 563 S.W.2d 314 (Tex. Civ. App. — Dallas 1978)....	17

OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals in El Paso (Pet. App. A) is reported at 598 S.W.2d 936. The per curiam opinion of the Supreme Court of Texas refusing to grant Petitioner a Writ of error (Pet. App. B) is reported at 606 S.W.2d 695.

JURISDICTION

The jurisdiction of this Court is invoked by Petitioner under 28 U.S.C. §1257(3). Respondent denies that such jurisdiction exists.

QUESTIONS PRESENTED

(1) Has Petitioner affirmatively demonstrated that the Federal questions involved were presented to and either decided by or necessary to the judgment of the Texas Supreme Court so as to invoke the jurisdiction of this Court?

(2) Does the Texas Court's Opinion, affirming a jury verdict which changed custody from Petitioner to Respondent, create a conclusive presumption and thereby raise due process and equal protection questions?

(3) Does the construction and application of the provisions of the Texas Family Code by the Texas Courts, which permits the jury to consider Petitioner's lifestyle along with other evidentiary matters, raise due process, equal protection or right of privacy questions?

(4) Does the construction and application of the provisions of the Texas Family Code by the Texas Courts, which permits the jury to consider the church attendance of the minor child along with other evidentiary matters, raise freedom of religion questions?

STATUTES INVOLVED

The only statute involved except those cited by Petitioner is 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

With full awareness of, and in fact because of, Supreme Court Rule 40(3), Respondent submits the following factual statement of this case.

Petitioner and Respondent were divorced in Odessa, Texas, on November 15, 1976, and Petitioner was awarded custody of the parties' three year old boy. Before the end of the same year Petitioner remarried,

and in two months separated from her new husband and met W.H. She then moved out of town for two months, at which time she began dating W.H. and held down a job for one month. In mid-April of 1977 Petitioner moved back to Odessa and obtained employment for about 2½ months. Toward the end of this brief period of employment she obtained a divorce from her second husband.

By late June of 1977 Petitioner was again unemployed. At this time she and the minor child began spending most of their time with W.H. and/or around his home. They would get up and go to W.H.'s house each morning, often eat breakfast with him, spend the day around his house, fix dinner for him when he arrived home and remain at his home until 10:00 p.m. or later. This was a regular weekday routine, with rare exceptions, for two and one-half months.

On the week-ends during this period of time Petitioner and W.H. would usually travel out of town, accompanied by the child on the alternate week-ends

that Respondent did not have visitation privileges. Although Petitioner and W.H. did not sleep together when accompanied by the child, they did all stay in W.H.'s cabin in Ruidoso on occasion.

In or about September of 1977 Petitioner went back to work. However, her relationship with W.H. endured, consisting in part of dinners and evenings at his home and more weekend trips. This relationship continued, except for a brief "separation", up until the time of trial in December of 1978.

Following a two day trial in which all the foregoing facts were presented to a jury, the jury found there had been such a change in the circumstances of the Petitioner and the child since November of 1976 that Petitioner's continued custody of the child would be injurious to the welfare of the child. The jury further found that Respondent's custody of the child would be a positive improvement for the child.

Bound by this jury verdict the trial court entered its judgment changing custody of the child to Respondent.

The Court of Civil Appeals concurred that the evidence was sufficient to sustain the jury's finding and affirmed. In its Motion for Rehearing Petitioner first asserted (without briefing or arguing) the constitutional issues raised herein. Such Motion was overruled without opinion and the Texas Supreme Court, in a per curiam decision which did not address any of the constitutional issues, denied a writ of error.

ARGUMENT

Petitioner asserts the jurisdiction of this Court under 28 U.S.C. §1257(3). However, Petitioner makes no attempt in her brief to show the factual basis for such jurisdiction. Respondent contends that the reason for such omission is simple: the record does not demonstrate any basis for this Court's jurisdiction.

With regards to the merits of the case, Respondent urges that the decisions and opinions of the

Texas appellate courts in this case did nothing more than sustain the sufficiency of the evidence relied upon by the jury in affirmatively answering the special issues submitted to it. Petitioner takes only a portion of this evidence, denominates it as an "irrebutable presumption" and proceeds to argue that the Texas Courts' reliance on such a presumption is unconstitutional.

JURISDICTION

Petitioner asserts that this Court has jurisdiction to grant a writ of certiorari pursuant to 28 U.S.C. §1257(3). This Court has consistently held that the mere existence of a "Federal question" is insufficient to invoke its jurisdiction under this statute. Of equal importance is the requirement that such questions have been presented to and either decided by or necessary to the judgment of the highest state court to which the writ is granted. As this Court stated in Lynch v. New York ex rel Pierson, 293 U.S. 52 (1934):

> "It is essential to the jurisdiction of this Court in reviewing a decision of a State that it must appear from

> the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision on the federal question was necessary to the determination of the cause and that it was actually decided or that the judgment rendered could not have been rendered without it. (Citations omitted)."

293 U.S. at 54 (emphasis added).

On the basis of the record currently before this Court (consisting of Appendices A and B to Petitioner's Brief) there is no indication that a Federal question has ever been presented to any Texas Court. Consequently, on the basis of the record, this Court has no jurisdiction.

Since Petitioner may, in view of this omission, hereafter certify portions of the record pursuant to Supreme Court Rule 12, Respondent further argues that the record will fail to demonstrate this Court's jurisdiction.

The record will show that Petitioner asserted (without briefing or arguing) a plethora of federal

questions in her Motion for Rehearing in the Court of Civil Appeals. After such Motion was overruled (without opinion), Petitioner raised her equal protection, equal rights, right of privacy and freedom of religion arguments in her Application for Writ of Error to the Texas Supreme Court. In denying the application, the Texas Supreme Court made no mention of the federal questions but merely found no reversible error in the judgment of the Court of Civil Appeals. See, Respondent's Appendix B.

Assuming then that at most four of Petitioner's five constitutional issues were presented to the Texas Supreme Court, the next inquiry is whether such federal questions were either "actually decided (by the Texas Supreme Court) or that the judgment rendered could not have been rendered without deciding (them)." Lynch, supra., at 52.

Since the opinion of the Texas Supreme Court clearly does not address the federal questions, this Court's jurisdiction depends on whether or not the

judgment rendered could have been rendered without deciding such questions.

When the highest State court fails to address a federal question presented to it, the presumption is that such failure is the result of the aggrieved party's failure to properly present it to the State court. Street v. New York, 394 U.S. 576 (1969). The aggrieved party thereafter has the burden of affirmatively showing the contrary to sustain jurisdiction. Id. Hence, under the current state of the record (before this Court and otherwise), it is presumptively established that the judgment of the Texas Supreme Court could have been rendered without deciding the federal questions presented. This Court therefore has no jurisdiction.

Respondent does not, however, rely solely on this presumption. Under Texas appellate procedure Petitioner's federal questions were not properly preserved for presentation to the Texas Supreme Court.

The Texas Supreme Court has frequently held that a point not assigned as error in the Court of Civil

Appeals cannot be considered by the Supreme Court. Watson v. Glenn Falls Insurance Company, 505 S.W.2d 793 (Tex. Sup. 1974); Texas State Highway Department v. Fillmon, 150 Tex. 460, 242 S.W.2d 172 (1951); Edwards v. Strong, 147 Tex. 155, 213 S.W.2d 979 (1948). This requirement is not satisfied merely by raising the matter in a Motion for Rehearing in the Court of Civil Appeals. Watson, supra. and Fillmon, supra.

In conclusion, Petitioner has failed to show the federal questions presented here were ever presented to the Texas Supreme Court. When and if she does so, Petitioner cannot show either that the Texas Supreme Court actually acted on such federal questions or that the judgment of the Texas Supreme Court could not have been rendered without deciding such questions. Consequently, this Court lacks jurisdiction and should deny the writ of certiorari accordingly.

Petitioner's Due Process Argument

It must be emphasized at the onset that this Court's jurisdiction to consider Petitioner's due process claim rests on even weaker ground than the other constitutional issues presented. The only mention of an alleged violation of Petitioner's due process rights in the Courts below is in the first line of Paragraph X of Petitioner's Motion for Rehearing in the Texas Supreme Court and is accompanied by neither argument nor authorities.

With regards to the merits of Petitioner's argument Respondent urges that there is none. This argument, like the others put forth by Petitioner, is premised on an inaccurate picture of the facts and a legally erroneous conclusion therefrom.

Factually, Petitioner has presented the Court with an incomplete recitation of the evidence in the case. This is illustrated by the following quotations from Petitioner's brief:

> "The only evidence upon which the jury verdict could have been based . . . was the fact that on week-ends while the child was visiting his father, Petitioner traveled out of town and stayed with the man that she had been dating for approximately two years." (Pet. Brief at 10-11) (emphasis added).
>
> "The Court of Civil Appeals in passing upon sufficiency of the evidence in this case held that it was because of Petitioner's unconventional lifestyle that the jury verdict must be upheld." (Pet. Brief at 11).

The fact is that the jury's verdict in this case was based on much more than just Petitioner's dating habits. Petitioner, within eight months after getting custody of the minor child: (1) remarried; (2) separated (3) divorced; (4) moved twice; (5) was employed, unemployed, employed and unemployed again; and (6) met W.H. and started dating him (before being divorced from her second husband). As the Court of Civil Appeals stated, Petitioner's relationship with W.H. was just "one element" which afforded support for the jury's verdict.

It is these additional facts which also differentiate this case from Jarrett v. Jarrett, _____U.S._____, cited by Petitioner. In Jarrett there was no other evidence to support the change of custody except Mrs. Jarrett's relationship with Mr. Hammon. See, Jarrett v. Jarrett, 400 N.E.2d 421 (Ill. 1980). In this case the jury not only had Petitioner's relationship with W.H. to consider, but also evidence of Petitioner's marital, employment and residential instability. Moreover, even when considered through Petitioner's narrow viewfinder, this Court's denial of writ in Jarrett supports a similar action in this case.

Petitioner's reliance on this Court's decision is Stanley v. Illinois, 405 U.S. 645 (1972) is also misplaced. In Stanley, it was held that a state statute denominating an unwed father as per se unfit to have custody of his off-spring denied such father due process and equal protection.

However, there is no such "irrebutable pre-

sumption" in this case. Respondent has never argued that Petitioner's lifestyle automatically disqualifies her to have custody of her minor child, nor did the Texas Courts in this case create such a presumption. All that has been urged and ruled on is that Petitioner's lifestyle is a relevant evidentiary matter which may be properly considered by a jury. Neither the jury verdict nor the judgments affirming that verdict require or even suggest that women or men with lifestyles akin to Petitioner's will be deprived of the custody of their minor children. They only affirm the right of juries to consider such lifestyles.

This Court's opinion in Stanley did not hold that Stanley's status with regards to his children was not a relevant factor to be considered in determining their custody. Similarly, this Court should not hold that Petitioner's lifestyle is not a relevant factor to be considered in determining the custody of her child.

Equal Protection

Petitioner's equal protection argument, like

her due process argument, is based on a factual inaccuracy, as illustrated by this quotation from Petitioner's Brief:

> "According to the Court of Civil Appeals in El Paso, the ex-husbands of single parents now need only show that the present custodian is dating a member of the opposite sex and traveling with him outside of the presence of the child." (Pet. Brief at 24-25). (emphasis added).

As previously pointed out, this was not the only evidence considered by the Court of Civil Appeals, see Pet. App. 6a-8a, and was but "one element" supporting the jury's verdict. Id. at 12a-13a. Furthermore, there is no basis for Petitioner's allegation that her status was even a "controlling factor" for the jury's verdict. Pet. Brief at 26. Absent any adequate factual support for Petitioner's allegations there would be no purpose served in responding to her legal arguments.

Equal Rights

Petitioner's equal rights argument is premised on two points: Petitioner's "beliefs" and Petitioner's "imagining."

In short, Petitioner "believes" the Texas Court of Civil Appeals would have viewed the case differently had the sex of her and Respondent been reversed, and "imagines" their attitude to be sexually discriminatory.

Such flights of imagination are wholly unsupported in Petitioner's brief or by the record. Absent any factual or legal foundation for Petitioner's argument, Respondent has nothing to respond to.

Freedom of Religion

After repeatedly alleging that the Court of Civil Appeals relied solely on Petitioner's lifestyle in affirming the jury's change of custody, Petitioner suddenly discovers the mention of church attendance in that Court's opinion and declares it to be "the only (other) evidence cited." The factual inaccuracy of this

allegation needs no discussion.

Petitioner does, however, argue that the mere mention of such evidence by the Court of Civil Appeals contravenes her First Amendment rights. Petitioner cites no authority for this proposition, but instead cites four Texas cases which hold that religious beliefs may not be relied upon to change custody.

In Watts v. Watts, 563 S.W.2d 314 (Tex. Civ. App.-Dallas, 1978) the Court was not even concerned with custody but with a trial court order requiring church attendance as a condition of visitation privileges.

In Noyes v. Jack, 443 S.W.2d 89 (Tex. Civ. App.-Beaumont 1969) the appellate court sustained the trial court's action in striking those portions of Plaintiff's pleading which complained of the lack of spiritual training given to the minor child by Defendant. In the instant case Petitioner made no objection to the evidence concerning church attendance and such facts were not alleged in any pleadings.

Similarly, in Frantzen v. Frantzen, 349 S.W.2d

769 (Tex. Civ. App. - San Antonio 1961) it was held that the trial court properly dismissed a divorce and child custody suit which was based wholly on allegations regarding the Defendant's religious beliefs.

Finally, in Salvaggio v. Barnett, 248 S.W.2d 244 (Tex. Civ. App.-Galveston 1952) the appellate court upheld the trial court's change of custody from the father to the mother despite the fact that the father's religious beliefs were a major factor in the trial court's decision. Although the appellate court did hold the father's religious beliefs to be an improper factual consideration, it still upheld the change of custody on the basis of all the other facts.

In view of the fact that Petitioner made no objection to the introduction of this evidence at trial, and in view of the other evidence adduced and relied on by the Court of Civil Appeals, Respondent urges that there is no showing of any infringement of Petitioner's freedom of religion.

Right Of Privacy

Respondent does not take issue with Petitioner's right to remain unmarried and choose her own lifestyle. Nor does Respondent contend that Petitioner's marital status or lifestyle bar her from having custody of her child.

Respondent does, however, urge that Petitioner's lifestyle was and is a legitimate matter which the jury had the right to consider in deciding custody of the child. It is important to reemphasize at this point that Petitioner's relationship with W.H. was not the only evidence before the jury. Petitioners second marriage, subsequent separation and ultimate divorce, all within eight months after her divorce from Respondent, were also in evidence, as was Petitioner's four different residences and three different jobs within twelve months. (Pet. App. 6a-8a).

Since Petitioner's right of privacy argument is premised on the allegation that the Texas Courts found that Petitioner's "unconventional lifestyle was sufficient

to support the answers to the jury verdict," (Petitioner's Brief at 35), and such allegation is factually inaccurate, Petitioner's argument is without merit.

CONCLUSION

Respondent submits that a writ of certiorari should not be granted in this cause for the following reasons:

(1) Petitioner's legal arguments are based upon isolated facts which present an inaccurate view of this controversy. Such inaccuracy is sufficient reason, under United States Supreme Court Rule 23(4), for denying the writ of certiorari.

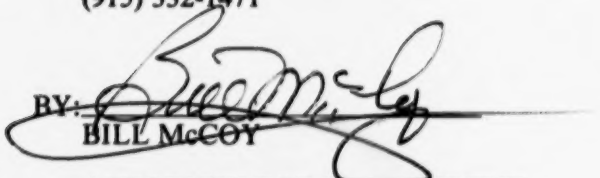
(2) Petitioner has failed to comply at all with Rule 23 1(F) of this Court by specifying when and how the federal questions raised were presented to the Texas state courts and the way in which they were passed on by such courts. The reason for such non-compliance is because the federal questions were neither timely nor properly raised and this Court does not have jurisdiction.

(3) There are no federal questions involved in this case. Petitioner's alleged constitutional deprivations are based on an incomplete representation of the facts. When all the facts are considered it is apparent that the jury verdict in this case, and the appellate court affirmances thereof, have adequate evidentiary support and are not violative of Petitioner's constitutional rights.

Respondent therefore prays the Court to deny its writ of certiorari.

Respectfully submitted,

Law Offices of Bill McCoy
308 North Jackson
Odessa, Texas 79761
(915) 332-1471



BY: BILL McCOY

ATTORNEY FOR RESPONDENT

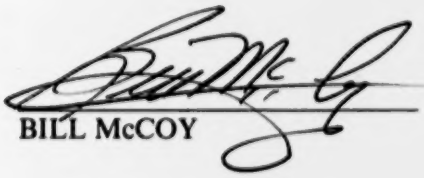
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Petition to Writ of Certiorari has been mailed to the following attorneys for Petitioner:

Tyron Lewis
Suite 510
American Bank Bldg.
Odessa, Texas 79761

Royal Caswell
P.O. Box 1529
Odessa, Texas 79760

on this the 7 day of August, 1981.



BILL McCOY